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In re Application of
Wiklof et al.
Application No. 10/630,062
Filed: 07/29/2003
Attorney Docket No. MVIS 02-22

: DECISION ON PETITION
: UNDER 37 CFR 1.78(a)(3)

This is a decision on the "PETITION TO ACCEPT UNINTENTIONAL DELAY OF PRIORITY CLAIM UNDER 37 C.F.R. § 1.55," which is being treated as a petition under 37 CFR 1.78(a)(3), filed March 5, 2007, to accept an unintentionally delayed claim under 35 U.S.C. § 120 for the benefit of priority to the prior-filed nonprovisional applications.

The petition is **dismissed**.

A petition for acceptance of a claim for late priority under 37 CFR 1.78(a)(3) is only applicable to those applications filed on or after November 29, 2000. Further, the petition is appropriate only after the expiration of the period specified in 37 CFR 1.78(a)(2)(ii). In addition, the petition under 37 CFR 1.78(a)(3) must be accompanied by:

- (1) the reference required by 35 U.S.C. § 120 and 37 CFR 1.78(a)(2)(i) of the prior-filed application, unless previously submitted;
- (2) the surcharge set forth in § 1.17(t); and
- (3) a statement that the entire delay between the date the claim was due under 37 CFR 1.78(a)(2)(ii) and the date the claim was filed was unintentional. The Director may require additional information where there is a question whether the delay was unintentional.

The petition does not comply with item (1)

In reviewing the chain of applications to which applicant is seeking a claim for priority, it does not appear that Application No. 10/304,724 (now Patent No. 6,653,621) referenced earlier-filed Application No. 09/369,674. Where an application claims a benefit under 35 U.S.C. § 120 of a chain of applications, the application must make a reference to the first (earliest)

application and every intermediate application. *See Sampson v. Ampex Corp.*, 463 F.2d 1042, 1044-45, 174 USPQ 417, 418-19 (2d Cir. 1972); *Sticker Indus. Supply Corp. v. Blaw-Knox Co.*, 405 F.2d 90, 93, 160 USPQ 177, 179 (7th Cir. 1968); *Hovlid v. Asari*, 305 F.2d 747, 751, 134 USPQ 162, 165 (9th Cir. 1962). *See also* MPEP 201.11. In addition, every intermediate application must also make a reference to the first (earliest) application and every application after the first application and before such intermediate application. MPEP Section 201.06(d).

Section 1481 of the MPEP states, in part:

Under certain conditions as specified below, however, a Certificate of Correction can still be used, with respect to 35 U.S.C. 120 priority, to correct:

- (A) the failure to make reference to a prior copending application pursuant to 37 CFR 1.78(a)(2); or
- (B) an incorrect reference to a prior copending application pursuant to 37 CFR 1.78(a)(2).

Where priority is based upon 35 U.S.C. 120 to a national application, the following conditions must be satisfied:

- (A) all requirements set forth in 37 CFR 1.78(a)(1) must have been met in the application which became the patent to be corrected;
- (B) it must be clear from the record of the patent and the parent application(s) that priority is appropriate (see MPEP § 201.11); and
- (C) a grantable petition to accept an unintentionally delayed claim for the benefit of a prior application must be filed, including a surcharge as set forth in 37 CFR 1.17(t), as required by 37 CFR 1.78(a)(3).

Therefore, since it does not appear that Application No. 10/304,724 (now Patent No. 6,653,621) referenced earlier-filed Application No. 09/369,674 as required by 37 CFR 1.78(a)(2)(i), applicant may wish to consider filing a petition under 37 CFR 1.78(a)(3) and a certificate of correction in Patent No. 6,653,621.

Additionally, the amendment as drafted is unacceptable, and therefore, is not considered a proper reference under 37 CFR 1.78(a)(2)(i). 37 CFR 1.78(a)(2)(i) requires that any nonprovisional application claiming the benefit of one or more prior-filed copending nonprovisional applications must contain or be amended to contain a reference to each such prior-filed application, identifying it by application number (consisting of the series code and serial number) and indicating the relationship of the applications. The relationship between the applications is whether the subject application is a continuation, divisional, or continuation-in-part of a prior-filed nonprovisional application. An example of a proper benefit claim is: "This application is a continuation of Application No. 10/---, filed---." A benefit claim that merely states: "This application claims the benefit of Application No. 10/---, filed---," does not comply with 37 CFR 1.72(a)(2)(i) since the proper relationship, which includes the type of continuing application, is

not stated. Also, the status of each nonprovisional parent application (if it is patented or abandoned) should also be indicated, following the filing date of the parent nonprovisional application. *See MPEP Section 201.11, Reference to Prior Nonprovisional Applications.*

Moreover, it does not appear that the Application Data Sheet correctly identifies the proper relationship between the applications. A review of the records indicates that Application No. 10/304,724 is a division of Application No. 09,816,809, which is a division of Application No. 09/369,674, **which differs from the relationships set forth in the ADS submitted on petition.**

In summary, applicant must submit: (1) a grantable petition under 37 CFR 1.78(a)(3), a certificate of correction, and the requisite fees in Patent No. 6,653,621; and (2) a renewed petition under 37 CFR 1.78(a)(3) in Application No. 10/630,062, accompanied by an ADS or a substitute amendment (complying with 37 CFR 1.121 and 37 CFR 1.76(b)(5)), which states the relationships of the prior-filed applications to this application.

Further correspondence with respect to this matter should be addressed as follows:

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Any questions concerning this matter may be directed to the undersigned at (571) 272-3211.

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